

A Necessary Evil: Proposition 16 and Its Impact on Academics and Athletics in the NCAA

Jeffrey M. Waller

Follow this and additional works at: <https://via.library.depaul.edu/jslcp>

Recommended Citation

Jeffrey M. Waller, *A Necessary Evil: Proposition 16 and Its Impact on Academics and Athletics in the NCAA*, 1 DePaul J. Sports L. & Contemp. Probs. 189 (2003)
Available at: <https://via.library.depaul.edu/jslcp/vol1/iss2/5>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Sports Law by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

**A NECESSARY EVIL:
PROPOSITION 16 AND ITS IMPACT ON ACADEMICS AND
ATHLETICS IN THE NCAA**

*Jeffrey M. Waller**

INTRODUCTION

Virtually everyone who has attended college—whether at a prestigious private academy, a four-year state university, or the local college—has something in common. While most students or former students likely recall universal experiences like pulling all-nighters, cramming for finals, or gathering around the beer keg, these answers miss something much more fundamental that all college students share before they even set foot on campus: an SAT or ACT score.¹ The standardized test score, whether for good or ill, is the primary component of any college application and provides the means by which admissions committees throughout the nation balance a prospective student's academic standing and potential for future scholastic success.² Once a high school senior has a test score, merely glancing at a rubric of test scores and grade point averages instantly delineates his or her chance of acceptance at a given school and suggests where he or she ought to direct application efforts. However, while each school generally includes a minimum score requirement among its evaluation criteria, a low score is not always a death sentence, particularly for student-athletes.

The National Collegiate Athletic Association (NCAA) recruitment and eligibility regulations clearly articulate the NCAA's desire that athletics remain a component, as opposed to the purpose, of the college experience.³ The extent of the NCAA regulations also reveals the degree to which they are necessary to prevent schools from bending their own admissions criteria to lure athletes who can not only improve a team's performance, but, often more importantly, garner increased revenue for the school.⁴ Accordingly, the NCAA has historically required high school graduates to meet certain minimum academic standards to qualify for athletic financial

* J.D. Candidate, DePaul University College of Law, Chicago, Illinois

¹ The College Entrance Examination Board (the College Board) has administered the SAT for nearly 80 years. The SAT was originally known as the Scholastic Aptitude Test, then later as the Student Achievement Test. It is now known simply as the SAT. See <http://www.collegeboard.com/about/newsat/history.html> (October 30, 2003). ACT, Inc. administers the ACT. When it emerged in the mid-1950s, the American College Testing Program administered the test as the American College Test. Today it is simply the ACT. See <http://www.act.org/aboutact/history.html> (October 30, 2003).

² For a poignant treatment of the SAT, including its usefulness in predicting future academic success, see Gerald W. Bracey, *Put to the Test: The Omnipresence of Tests and What You Need to Know About Them*, 39-46 (1998). See also John Cloud, *Inside the New SAT Test*, TIME (Vol. 162 No. 17) at <http://www.time.com/time/magazine/article/0,9171,1101031027-524393,00.html> (October 30, 2003).

³ See *NCAA Manual 2003-04* (Bylaw, Art. 13 Recruiting, 85-124; Bylaw, Art. 14 Eligibility, 125-174), at http://www.ncaa.org/library/membership/division_i_manual/2003-04/2003-04_d1_manual.pdf (October 30, 2003).

⁴ See Laura Pentimone, *The National Collegiate Athletic Association's Quest To Educate the Student-Athlete: Are the Academic Eligibility Requirements an Attempt to Foster Academic Integrity or Merely to Promote Racism?*, 14 N.Y.L. SCH. J. HUM. RTS. 471, 476 (Winter 1998). ("University administrators at Division I schools argue that big-time athletic programs accomplish a number of things for a university, including: '(1) they attract attention to a school; (2) they increase academic prestige; (3) they boost student enrollment; (4) they build school spirit.'")

aid and to compete as college freshmen.⁵ Proposition 16 is the NCAA's most recent formulation of these standards, establishing the minimum SAT and high school course requirements demanded of incoming student-athletes.⁶ Since its implementation in 1996, and subsequent amendment in August 2003, Proposition 16 has become the subject of heated debate as many people claim (and numerous statistics show) that it disqualifies a disproportionate number of black student-athletes from eligibility.⁷

In light of this controversy, the question becomes not only whether Proposition 16 unfairly discriminates against black student-athletes, but, if so, how ought (and indeed can) the NCAA establish minimum scholastic requirements to boost college graduation rates by using a blanket, one-size-fits-all standard? Any formulation of minimum academic standards is infeasible and incongruous without at least minimal reliance on a universal balancing system like the SAT, despite the fact that it inherently but unavoidably discriminates against racial minorities. Consequently, a judicial decision to invalidate Proposition 16 would drastically undercut the NCAA's ability to ensure that incoming student-athletes meet minimum academic qualifications.

Inextricably intertwined in this debate is the NCAA's ongoing struggle to preserve the integrity and amateurism of collegiate athletics while maximizing the earnings of member institutions. Unquestionably, it is difficult to reconcile the NCAA's emphatic desire to equate the terms "amateur" and "student-athlete" with its apparent eagerness to profit from the promotion of college sports, particularly football and men's basketball.⁸ As a result, a court decision undermining Proposition 16 would not only crimp the NCAA's ability to enforce eligibility requirements, but may ultimately force the NCAA to reevaluate its conflicting desires to enforce those standards while simultaneously serving as the farm system for the National Football League and National Basketball Association.

⁵ In addition to meeting Proposition 16's minimum SAT requirements, prospective student-athletes must also satisfactorily complete 14 "core" classes as defined by the NCAA. See *2003-04 NCAA Guide for the College-Bound Student-Athlete*, 2, at http://www.ncaa.org/library/membership/division_i_manual/2003-04/2003-04_d1_manual.pdf (October 30, 2003).

⁶ The NCAA's minimum academic requirements, known as Proposition 16, are listed in the *NCAA Manual 2003-04* (Bylaw, Art. 14.3 Eligibility, 138-149), *supra* note 3.

⁷ See *infra*, note 22.

⁸ See *NCAA Manual 2003-4* (Bylaw, Art. 12 Amateurism, 69), at http://www.ncaa.org/library/membership/division_i_manual/2003-04/2003-04_d1_manual.pdf (October 30, 2003). See also Robert Lipsyte, *Lesson No. 1: Mixed Messages Part of Curriculum*, THE NEW YORK TIMES, 11 (Jan. 20, 2002, Sec. 8). (The NCAA uses the term 'student-athlete' "with a hilariously holy righteousness"). See also *NCAA Fact Sheet*, at http://ncaa.org/about/fact_sheet.pdf. In 1999, revenue from Division I, II, and III athletics totaled nearly \$30 million, with over \$9 million coming from Division I-A football. Also, since the NCAA's creation of the Bowl Championship Series (BCS) in the sport of football, the commercial exploitation of that sport, as well as member school profits, has increased even more dramatically.

II. BACKGROUND

A. *The Road to Proposition 16: The NCCA and the History of Freshman Eligibility Standards*

The NCAA is the principal governing body of intercollegiate athletics in the United States.⁹ Established in 1906 as the Intercollegiate Athletic Association of the United States (it became the NCAA in 1910), the organization originally convened to reform the rules of football.¹⁰ For several years the NCAA was merely a discussion group and rule-making body consisting of 18 institutions. However, today the NCAA styles itself as “a voluntary association of about 1,200 colleges and universities, athletic conferences, and sports organizations.”¹¹ One of the NCAA’s primary functions is the establishment of requirements for athletic scholarships, recruiting, and the academic eligibility of incoming freshman student-athletes. Specifically, the NCAA seeks to “protect student-athletes through standards of fairness and integrity” and “to encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship, and amateurism.”¹² Central to this charge is the NCAA’s steadfast insistence that college sports are, by definition, amateur sports, a notion safeguarded in part by the establishment and enforcement of academic eligibility requirements through measures like Proposition 16.¹³

Originally, individual colleges and universities bore responsibility for enforcing their own minimum academic eligibility requirements. However, without any supervising authority, schools in the early years of the twentieth century often courted athletes who had no interest in receiving an education or pursuing a degree.¹⁴ Essentially hired guns, these “tramp” athletes went from school to school over several seasons in pursuit of the best offers, which routinely included all-expense-paid vacations or other enticements.¹⁵ To eliminate this phenomenon, the

⁹ See *What Is the NCAA?*, at http://www.ncaa.org/about/what_is_the_ncaa.html (October 30, 2003).

¹⁰ President Theodore Roosevelt prompted the formation of the NCAA to combat increasing levels of violence in college football. The NCAA’s original purpose was to “reduce[e] violence and standardize play.” See *It Was the Flying Wedge, Football’s Major Offense in 1905, That Spurred the Formation of the NCAA*, at <http://www.ncaa.org/about/history.html> (October 30, 2003).

¹¹ See *What Is The NCAA?*, at http://ncaa.org/about/what_is_the_ncaa.html (October 30, 2003). See also *It Was the Flying Wedge*, *supra* note 10. In 1973, the NCAA divided member institutions into three legislative and competitive groups—Division I, Division II, and Division III—which exist primarily to facilitate bylaw legislation and promote competitive equality. The nation’s nearly 300 major colleges and universities compose Division I. For football, the NCAA further divided Division I into the subdivisions I-A and I-AA. See also *What’s the difference between Divisions I, II and III?*, at http://www.ncaa.org/about/div_criteria.html (October 30, 2003).

¹² See *NCAA Manual 2003-04*, (Constitution, Article 1.3 Fundamental Policy, p. 1), at http://www.ncaa.org/library/membership/division_i_manual/2003-04/2003-04_d1_manual.pdf (October 30, 2003). (“The competitive athletic programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.”) See also Lipsyte, *Lesson No. 1*, *supra* note 7. (“Like any trade association, the N.C.A.A.’s mission is to protect its members from each other and from the outside world. When the N.C.A.A. actually enforces one of the complicated rules enacted by its members, it is expected to absorb criticism from the injured member, its public, and a news media conditioned to attack the N.C.A.A. instead of the perpetrating college.”)

¹³ Proposition 16 applies only to Division I institutions.

¹⁴ See Kenneth L. Shropshire, *Colorblind Propositions: Race, The SAT, & the NCAA*, 8 STAN. L. & POL’Y REV. 141, 143 (Winter 1997).

¹⁵ See *id.*

NCAA first gave substantive meaning to the term “student-athlete” by limiting athletic eligibility to students actually making progress towards a degree.¹⁶

The NCAA did not return to the issue of student-athlete eligibility until after World War II, when in 1947 it implemented the “sanity code,” which banned all athletic scholarships in attempt to curb rampant recruiting and financial aid abuse.¹⁷ However, colleges and universities easily circumvented the dramatic new measure by either providing athletes with secret scholarships or discreetly paying them for their services. Consequently, the NCAA repealed the sanity code after only three years, which again left member institutions to determine their own academic eligibility requirements.¹⁸

In 1965, fifteen years after the failure of the sanity code, the NCAA instituted the “1.6 Rule,” the association’s first effort to establish uniform eligibility requirements that would supercede those of member colleges and universities.¹⁹ The 1.6 Rule relied on a relatively complex forecasting method that attempted to predict an incoming student-athlete’s ability to maintain a 1.6 grade-point average (GPA) during his or her first year of college. Specifically, the NCAA created a formula that weighed the prospective student-athlete’s high school GPA, class rank, and SAT or ACT score. High school graduates who failed to predict at a 1.6 were ineligible, and schools that violated the new requirement faced the threat of NCAA sanction.²⁰

In 1973, the NCAA replaced the 1.6 Rule with the 2.0 Rule.²¹ Much more straightforward than its predecessor, the 2.0 Rule abandoned standardized testing and required only that prospective student-athletes complete high school with a 2.0 GPA. Though praised for its simplicity, the 2.0 Rule also received criticism for relying solely on high school grades.²² Critics cited not only the lack of uniformity in the nation’s various high school grading procedures, but also feared that high school faculty could abuse the rule by boosting the grades of otherwise ineligible student-athletes.²³ Nevertheless, the NCAA applied the 2.0 Rule through the mid-1980s. Not until the revelation of several university scandals involving the exploitation of college athletes, in combination with rising public outcry over the perceived poor academic preparation and success of student-athletes, did the NCAA seriously entertain reform efforts.²⁴

The NCAA responded to critics of the 2.0 Rule by establishing Proposition 48, which it hoped would improve graduation rates for student-athletes and bolster the integrity of college sports in general. Implemented for the 1986-87 academic year, Proposition 48 essentially added a minimum SAT requirement to the 2.0 Rule. The new criteria demanded a minimum 700 (out of 1600) combined SAT score (57 of 144 ACT) along with a minimum 2.0 GPA.²⁵ Although Proposition 48 succeeded in raising overall student-athlete graduation rates, particularly for black

¹⁶ See *id.*

¹⁷ See Nathan Hunt, *Cureton v. NCAA: Fumble! The Flawed Use of Proposition 16 by the NCAA*, 31 U. TOL. L. REV. 273, 278 (Winter 2000).

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.*

²¹ See Nathan Hunt, *Cureton v. NCAA: Fumble! The Flawed Use of Proposition 16 by the NCAA*, 31 U. TOL. L. REV. 273, 279 (Winter 2000).

²² See *id.*

²³ See *id.*

²⁴ *Cureton v. NCAA*, 37 F. Supp. 2d 687, 290 (E.D. Pa. 1999).

²⁵ The SAT “re-centered” its scoring system as of April 1, 1995. Under the new system, a combined score of 820-830 was the equivalent of a 700 under the original system. In this light, the increased requirements of Proposition 16 are not as dramatic. See Pentimone, *supra* note 4, at 482.

student-athletes, the measure received harsh criticism because it declared ineligible a disproportionately high percentage of black student-athletes.²⁶

Proposition 48 eventually gave way to Proposition 16, which the NCAA adopted in 1992 and fully implemented during the 1996-1997 academic year. Proposition 16 increased the number of core high school classes (from 11 to 13) in which a student-athlete must have a minimum GPA and established a formula for balancing a student's GPA with his or her test score. In essence, Proposition 16 raised the minimum SAT score prerequisite, for example requiring students with a 2.0 GPA to score a 1010 on the SAT (86 ACT).²⁷ However, the new sliding scale for balancing GPA and SAT scores also provided more flexibility, in that it granted eligibility to student-athletes with lower test scores provided they earned high marks in high school.²⁸ Although Proposition 48 was not without critics, opponents of Proposition 16's heightened standards have become much more vocal, especially in light of the publication of

²⁶ There is ample statistical research indicating that Proposition 48, while raising the overall graduation rate of student-athletes (particularly of black student athletes), declared a disproportionately high percentage of black student-athletes ineligible. See NCAA Research Report No. 96-01 (1997), quoted in Cureton, 37 F. Supp. 2d at 703 n.18:

Graduation Rates for Student-Athletes

	1983	1984	1985	1986	1987	1988	1989
Total	51%	52%	52%	57%	57%	59%	58%
White	58%	59%	59%	62%	62%	63%	63%
Black	35%	35%	36%	44%	45%	45%	46%

Percentage of Athletic Scholarships Held By African-American Student-Athletes

and the Number of Graduating African-American Student-Athletes

	1983	1984	1985	1986	1987	1988	1989
Total # Frosh. Student Athletes	13,144	13,451	13,640	12,871	13,517	14,265	13,962
Black %	27.3%	26.6%	27.3%	23.6%	23.4%	23.2%	25.0%
Black Graduates	1,246	1,256	1,337	1,334	1,419	1,496	1,613

See also *What's Wrong With Prop. 16?*, at <http://www.fairtest.org/facts/prop48.htm> (October 30, 2003). ("NCAA data on student-athletes' academic performance prior to the 1986 implementation of Prop. 48 reveal the discriminatory impact of these rules. The data, reanalyzed by the McIntosh Commission on Fair Play in Student-Athlete Admissions, show that had Prop. 48 been in effect in 1984 and 1985, it would have denied full eligibility to 47% of the African American student-athletes who went on to graduate, but just 8% of the white student-athletes. More recent NCAA research shows that the test score requirement disqualifies African American student-athletes at a rate 9-10 times the rate for white students.") See also Hunt, *NCAA v. Cureton: Fumble!*, *supra* note 14, at 280. ("In Proposition 48's first two years of operation, the NCAA declared 560 Division I football and basketball players not eligible.... Of those athletes declared ineligible, 84% of the football players and 92% of the basketball players were African-American. Moreover ... 86% of all athletes affected by Proposition 48 were African-American.")

²⁷ *Pryor v. NCAA*, 288 F.3d 548, 553 (3rd Cir. 2002). For the full SAT/GPA sliding scale outlined by Proposition 16, see 2003-04 *NCAA Guide for the College-Bound Student-Athlete*, 2, *supra* note 5.

²⁸ *Id.*

statistics revealing that Proposition 16 tends to magnify the shortcomings of its predecessor.²⁹ Perhaps most telling is evidence revealing that, in 1992, 67 percent of white college-bound high school seniors would have met the Proposition 16 requirements while only 46 percent of blacks would have been eligible.³⁰ Certainly, Proposition 16 has become the subject of even more intense scrutiny now that the Third Circuit's decision in *Pryor v. NCAA* has provided an opportunity to directly challenge its validity.³¹

Undoubtedly motivated, at least in part, by the decision in *Pryor*, the NCAA has since implemented a modified version of Proposition 16 that took effect August 1, 2003.³² In an apparent attempt to reduce reliance on standardized test scores, the amended requirements extend the existing GPA/SAT scale to assist students with superior grades but poor test scores. (The amendment also increased the number of required core courses to 14).³³ Under the new rule, even a student with a combined SAT score of 400 (the lowest possible mark) is still eligible if he or she earns a GPA of 3.55 or higher.³⁴ Nevertheless, experience will dictate whether reform that merely mitigates the impact of the SAT, as opposed to abandoning it altogether, will adequately overcome Proposition 16's tendency to profile students by race.

B. Proposition 16 Has No Disparate Impact: Cureton I and II

In 1999, Proposition 16 first came under fire in the case of *Cureton v. NCAA*.³⁵ In that case, Tai Kwan Cureton and Leatrice Shaw, both African-American track stars who were graduated from Philadelphia's Simon Gratz High School in 1996, lost first-year athletic eligibility by failing to meet Proposition 16's minimum SAT requirement.³⁶ Although Cureton and Shaw each maintained the requisite GPA and earned other academic honors,³⁷ their Division I scholarship offers vanished once they became ineligible.³⁸

²⁹ See *Who Can Play? An Examination of NCAA's Proposition 16* (1996), at <http://nces.ed.gov/pubs/95763.html> (October 30, 2003). ("Lower proportions of minority (blacks and Hispanics) [compared to whites] and low SES [socioeconomic status] college-bound high school seniors met the eligibility requirements for freshman varsity athletics participation under Proposition 48 and the proportions drop further under Proposition 16.") A low SAT score is the primary reason why most prospective black student-athletes fail to qualify for eligibility under Proposition 16.

³⁰ See *id.*

³¹ *Pryor*, 288 F.3d 548.

³² See NCAA Division I Board of Directors Gives Final Approval To New Academic Standards, at <http://www.ncaa.org/releases/divi/2002103101d1.htm> (October 30, 2003).

³³ See *id.*

³⁴ See *2003-04 Guide for the College-Bound Student-Athlete*, *supra* note 5, pp. 2-4. In addition to extending the SAT/GPA, the amended version of Proposition 16 increased the number of required core courses from 13 to 14 and removed computer science from the list of core courses. Also, incoming student-athletes may no longer receive certification as partial qualifiers under the new standard. ("A 'partial qualifier' is eligible to practice with a team at its home facility and receive an athletics scholarship during his or her first year at a Division I school and then has three seasons of competition remaining. A partial qualifier may earn a fourth year of competition, provided that at the beginning of the fifth academic year following the student-athlete's initial, full-time collegiate enrollment, the student-athlete has received a baccalaureate degree.") The NCAA's amendments to Proposition 16 simply extended the existing sliding scale that had been used to determine partial qualifier status, effectively eliminating the need to recognize a middle ground between qualifiers and non-qualifiers.

³⁵ *Cureton*, 37 F. Supp. 2d 687 (E.D. Pa. 1999). This decision has subsequently become known as "*Cureton I*."

³⁶ *Cureton v. NCAA*, 198 F.3d 107, 109 (3rd Cir. 1999).

³⁷ *Cureton* graduated 27th in a class of 305 students while Shaw graduated fifth and was a member of the National Honor Society. Shaw also managed to gain eligibility as a partial qualifier. .

³⁸ *Cureton*, 198 F.3d at 109.

In their complaint, Cureton and Shaw (who were later joined by Andrea Gardner and Alex Wesby, African-American youths who also failed to achieve minimum test scores) asserted that Proposition 16's minimum SAT component created an unjustified disparate impact on African-American student-athletes. The Eastern District Court of Pennsylvania found for the plaintiffs, stating that while the NCAA had a legitimate interest in raising the graduation rates of all student-athletes, Proposition 16 was not a legitimate means for accomplishing that objective.³⁹ However, the Third Circuit reversed.⁴⁰ That court held that Title VI of the Civil Rights Act of 1964⁴¹ did not apply to the NCAA because the NCAA did not exercise "controlling authority" over its member institutions' "ultimate decision" about a student-athlete's eligibility.⁴² On remand, the plaintiffs moved to either amend their complaint or to have the judgment altered to add a claim of intentional discrimination based on the NCAA's establishment and enforcement of Proposition 16.⁴³

In the decision referred to as "*Cureton II*," the district court denied the motion on the grounds of prejudice, delay, and futility.⁴⁴ The Third Circuit subsequently affirmed the dismissal, but only on grounds of prejudice and delay. The circuit court ruled not only that allowing an amended complaint would force the NCAA to re-litigate the entire case, but also that the plaintiffs had admitted that they simply chose not to bring an intentional discrimination claim in the first place.⁴⁵ Central to *Cureton II* was the Third Circuit's refusal to affirm the district court's dismissal on grounds of futility, which hinted at the potential viability of an intentional discrimination claim and set the stage for *Pryor*.

C. Proposition 16 the Product of Intentional Discrimination?: *Pryor v. NCAA*

On May 6, 2002, the United States Court of Appeals for the Third Circuit decided *Pryor v. NCAA*. The Court held that claims alleging that Proposition 16 discriminates on the basis of race—and that the NCAA enacted the regulation because of its discriminatory impact—sufficiently stated a claim for relief.⁴⁶ In essence, *Pryor* prepared the ground for a direct assault on Proposition 16's validity.

In that case, Kelly Pryor, a learning-disabled African-American student-athlete, and Warren Spivey, also an African-American student-athlete, each signed a National Letter of Intent (NLI) to play at San Jose State University and the University of Connecticut, respectively.⁴⁷

³⁹ Pryor, 288 F.3d at 553-54.

⁴⁰ Cureton, 198 F.3d at 107.

⁴¹ 42 U.S.C. § 2000d (2002). "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

⁴² Pryor, 288 F.3d at 554. For a fuller treatment of Cureton, as well as a treatment of the NCAA's vulnerability to Title VI litigation, see David P. Bruton, *At the Busy Intersection: Title VI and NCAA Eligibility Standards*, 28 J.C. & U.L. 569, 573-602 (2002). See also Anneliese Munczinski, *Interception! The Courts Get Another Pass at the NCAA and the Intentional Discrimination of Proposition 16 in Pryor v. NCAA*, 10 VILL. SPORTS & ENT. L.J. 389, 404-05 (2003).

⁴³ Cureton v. NCAA, 252 F.3d 267, 269 (3rd Cir. 2001) (citing district court's decision to deny plaintiffs' motion).

⁴⁴ *Id.* at 273-74. The district court offered four reasons for denying the plaintiffs' motion: the three-year wait between filing of the complaint and the motion; the two-and-a-half-year knowledge of information necessary to file the motion; the effect on judicial efficiency; and the interest of finality.

⁴⁵ *Id.* at 271.

⁴⁶ Pryor, 288 F.3d at 552.

⁴⁷ *Id.* at 554-555.

Neither Pryor nor Spivey met the eligibility requirements mandated by Proposition 16.⁴⁸ Pryor, however, applied for and received a waiver of the eligibility rules, allowing her to receive athletic financial aid even though she was still ineligible to participate as a freshman.⁴⁹ The NCAA denied a similar request filed on Spivey's behalf by the University of Connecticut and, consequently, Spivey was ineligible to either participate or receive athletic financial aid during his freshman year.⁵⁰

Both Pryor and Spivey brought suit claiming that, by adopting Proposition 16, the NCAA intentionally discriminated against them in violation of Title VI of the Civil Rights Act of 1964⁵¹ and 42 U.S.C. § 1981.⁵² In addition, Pryor sued under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., and the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., alleging that the NCAA discriminated against her because of her learning disability.⁵³ The District Court for the Eastern District of Pennsylvania dismissed Pryor and Spivey's Title VI claims, holding that the NCAA adopted Proposition 16 "in spite of" and not "because of" its alleged disparate impact on minority student athletes.⁵⁴ Additionally, the district court dismissed the § 1981 claim because Pryor and Spivey failed to allege intentional discrimination as required under that section.⁵⁵ Finally, the district court also dismissed Pryor's ADA and Rehabilitation Act claims because she still had the opportunity to earn back her missed year of eligibility by completing 75 percent of her degree requirements by the time she finished her fourth year of college.⁵⁶

On appeal, the United States Court of Appeals for the Third Circuit reviewed each of the district court's decisions. The appellate court upheld the dismissal of Pryor's ADA and Rehabilitation Act claims for both lack of redress and lack of ripeness and with the lower decision that "the court cannot order the declarative or injunctive relief Pryor seeks if the NCAA may later award her that relief anyway."⁵⁷ However, the appellate court reversed the dismissals of Pryor and Spivey's Title VI and § 1981 claims.

Beginning with the Title VI claims, the court held that to sufficiently state a claim for relief the plaintiffs needed merely to show that there was *a chance* that the NCAA adopted Proposition 16 "because of" and not merely "in spite of" its disparate impact on an identifiable group.⁵⁸ Pryor and Spivey presented various studies and reports showing that the NCAA knew that Proposition 16 would effectively "screen out" or reduce the percentage of black student athletes who could qualify for athletic financial aid and first year eligibility.⁵⁹ Although the court acknowledged that the NCAA might have adopted Proposition 16 to assist black student athletes,

⁴⁸ *Id.* at 555.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ 42 U.S.C. § 2000d (2002), *supra* note 41.

⁵² 42 U.S.C. § 1981 (2002).

⁵³ Pryor, 288 F.3d. at 552.

⁵⁴ *Id.* at 569.

⁵⁵ 42 U.S.C. § 1981 (2002).

⁵⁶ *Id.*

⁵⁷ Pryor, 288 F.3d at 561.

⁵⁸ *Id.* at 564.

⁵⁹ *Id.* (The court held that it was "clear that the NCAA considered race as one of its reasons for adopting Proposition 16, with the NCAA stating explicitly that it believed the adoption of this policy would increase the graduation rates of black athletes relative to white athletes." The plaintiffs further alleged that the NCAA was familiar with a series of studies and reports (most of which compiled by the NCAA itself) suggesting that Proposition 16's heightened eligibility requirements would reduce the percentage of black student athletes who could qualify.)

it ruled that any policy that purposely discriminates on the basis of race, regardless of its underlying intent, is presumptively invalid.⁶⁰ Agreeing with Pryor and Spivey, the court stated that “this is not a case where the NCAA simply realized or otherwise could have guessed that Proposition 16 would have had a disparate impact on black athletes.”⁶¹ Specifically, the court held: “based on the face of the complaint and all reasonable references thereto, the NCAA at least partially intended to reduce the number of black athletes who could attend college on an athletic scholarship by adopting the heightened academic requirements of Proposition 16.”⁶²

Similarly, the court reversed the lower court’s decision on the plaintiffs’ § 1981 claims. Section 1981 of Title 42 ensures that all persons within the jurisdiction of the United States have equal rights to make and enforce contracts, to sue, participate as parties, and give evidence, among other guarantees.⁶³ In *Pryor*, the court found that Pryor and Spivey satisfied the three elements of § 1981 analysis because: they belonged to a racial minority; the NCAA intended to discriminate on the basis of race; and the discrimination concerned one or more of the activities enumerated in § 1981, particularly the right to make and enforce contracts.⁶⁴ As African-Americans students, both Pryor and Spivey clearly met the first element. To satisfy the second element, the court relied on the same evidence that the plaintiffs presented to show that the NCAA intentionally discriminated on the basis of race by adopting Proposition 16. Finally, the court accepted the plaintiffs’ argument that the NLI’s signed by Pryor and Spivey qualified as contracts within the meaning of the third element of the § 1981 test.⁶⁵ Although the district court found that the plaintiffs had agreed to conditions which required them to satisfy the academic standards of Proposition 16, the Third Circuit reversed that decision and held that the NCAA could not enforce the NLI terms because they were the product of the NCAA’s alleged discrimination.⁶⁶

III. ANALYSIS

A. *What’s Wrong with the SAT?*

The SAT, as the essential component of Proposition 16 and the source of that regulation’s discriminatory impact, will likely become the first casualty of a decision to invalidate Proposition 16. However, getting to the root of what the SAT is, and is not, is difficult. Debates over what the SAT purportedly measures, its accuracy, and whether it is inherently or intentionally discriminatory (both as to race and gender) are nearly as old as the test itself.

⁶⁰ *Id.* at 565-566.

⁶¹ Pryor, 288 F.3d at 564. *See also Fairness for Black College Athletes*, NEW YORK TIMES, 30 (Mar. 11, 1999 Late Ed., Sec. A). (“According to NCAA figures, 26.6 percent of the black students who applied for eligibility in 1996 did not meet Proposition 16 standards, compared with 6.4 percent of white student athletes. The main reason for their not meeting the standards was a failure to achieve the minimum SAT score.”)

⁶² *Id.*

⁶³ 42 U.S.C. § 1981a (2002). “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”

⁶⁴ Pryor, 288 F.3d at 569.

⁶⁵ *Id.*

⁶⁶ *Id.*

Scores of literature—contributed by academicians, educators, psychologists, psychometricians,⁶⁷ interest groups,⁶⁸ and countless others—exist on both sides of the debate, and range from scholarly treatises to open-forum Internet posts.⁶⁹ Traditionally, the College Board and the Educational Testing Service (ETS), the organizations that own and administer the test, have asserted that the SAT is most useful in determining success during the first year of college.⁷⁰ However, today the College Board is somewhat less declarative, claiming merely that the SAT “provide[s] educational institutions with an honest measure of American students’ abilities” and “tells colleges how well students use the skills and knowledge they’ve learned so far, both in and out of school.”⁷¹ According to an exhaustive 2002 College Board study, the most accurate predictor of success in college is a combination of high school grades, SAT scores, and SAT II scores, a determination which lends credence to standards like Proposition 16, which balances both grades and SAT scores.⁷²

However, for all the debate over what the SAT measures, there is one statistical trend that nearly all commentators agree upon: black students average between 100 to 200 points lower on the SAT than white students.⁷³ There are numerous explanations for this tendency, ranging from claims that the American educational system stems from a history of blatant racism, classism, and the trappings of slavery, to more modest arguments that, on average, African-American students simply receive lower quality education than white students.⁷⁴ Additionally, there are contrasting explanations for how the SAT intersects with this trend. Some critics argue that the SAT is simply a mirror that reflects the nation’s socioeconomic makeup, while others insist that the SAT is a vehicle that perpetuates the unequal distribution of wealth and opportunity by relegating those who perform poorly to lower rungs of the socioeconomic ladder.⁷⁵

The most generally accepted explanation for this discrepancy is that success on the SAT is inextricably tied to socioeconomic status. As any student who has taken a standardized test like the SAT likely realizes, these tests do not evaluate intellect or future scholastic potential as much as they assess a student’s ability to take a particular test. More simply, the SAT tests a student’s access to tools that will allow him or her to perform well on the SAT.⁷⁶ Unfortunately, in the United States, a student’s access to most academic resources is tied inextricably to his or

⁶⁷ Psychometrics is study of test design and test analysis. Psychometricians design tests for fire fighters, lawyers, architects, teachers, and students, among others. See Cloud, *supra* note 3.

⁶⁸ In fact, an entire advocacy group, FairTest, exists almost solely to generate press releases that expose flaws with the SAT and to erode the test’s entrenched position in American education. See <http://www.fairtest.org> (October 30, 2003). See also *Who Can Play?*, *supra* note 25.

⁶⁹ For an excellent examination of the intersection between race and the SAT, see *Compelling Interest: Examining Evidence on Racial Dynamics in Colleges and Universities*, 22-48 (Michael J. Chang, *et al* eds. 2003). For a much more unfavorable treatment of the SAT and racism, albeit one tinged by an undercurrent of conspiratorial paranoia, see also Gloria Boutte, *Multicultural Education: Raising Consciousness*, 261-274, 277-280 (1999).

⁷⁰ See Cloud, *supra* note 2. See also Bracey, *supra* note 2 at 43.

⁷¹ See *What Do the Tests Really Measure?*, at <http://www.collegeboard.com/parents/article/0,3708,700-701-0-21294,00.html> (October 30, 2003).

⁷² SAT II subject tests are a battery of achievement tests that the College Board offers in 18 subjects, ranging from physics to Korean. Achievement tests gauge mastery of subject matter, much in the way a U.S. history final examination. The SAT more closely resembles an aptitude test. Aptitude tests are essentially IQ tests and attempt to measure the rather vague notion of “general intelligence.” See Cloud, *supra* note 3.

⁷³ See *id.* See also Cloud, *What Does SAT Stand For?*, *supra* note 34.

⁷⁴ See Boutte, *supra* note 62 at 274, 278.

⁷⁵ *Id.* at 278, 280.

⁷⁶ See Len Elmore, *Leveling the Testing Playing Field*, at <http://www.testu.com/info/trends/trendindex.asp>. (Apr. 14, 2003)

her financial resources.⁷⁷ Consequently, because of....without an effective solution for closing the gap between the nation's affluent schools and those that are less fortunate, it is unlikely that the NCAA could ever lawfully employ any nationwide balancing system that does not tend to sort students by race. Eliminating race (read 'affluence') as a factor for consideration becomes especially difficult when viewed in light of the vast unequal distribution of wealth that exists in the United States. Barring a spectacular and unprecedented American social revolution, relying on Proposition 16, or any other nationally applicable balancing scheme, will divide students according to financial worth while unavoidably sorting them by race as well.⁷⁸

B. *Why Proposition 16 Works*

As *Pryor* revealed, Proposition 16 is valid without a showing that the NCAA adopted it "because of" its discriminatory impact. Although the NCAA's amendments to Proposition 16 dramatically reduce its reliance on the SAT and seemingly diminish the odds of a judge striking it down, any formulation of eligibility standards that incorporates SAT scores is likely to become the target of an intentional discrimination charge. However, even the original version of Proposition 16—despite its unfortunate (and, to many critics, deplorable) discriminatory impact—its use of the SAT as a universal balance and the effect of its relatively high standards make it the most viable alternative currently available.

For all its critics, there are many educators and school officials who support the original version of Proposition 16.⁷⁹ Advocates, both black and white, argue that Proposition 16's heightened standards reflect neither patent nor latent racism, but instead serve to promote the value of education and raise graduation rates.⁸⁰ By underscoring the significance of high school academics, supporters of Proposition 16 believe that student-athletes who qualify have a greater appreciation of the importance of education and, as a result, are more motivated to actively pursue a degree once they begin college.⁸¹ Much in the way that raising the bar encourages a pole-vaulter to try harder to improve his or her performance, Proposition 16 heightens the requirements dictated by Proposition 48 and its predecessors in hopes that prospective student-athletes will take steps to improve academically. In fact, there are many people who insist that Proposition 16 is not stringent enough. Many college presidents and faculty condemn the SAT

⁷⁷ See *Who Can Play?*, *supra* note 28.

⁷⁸ Nearly every aspect of the SAT is subject to debate. The claim emphasizing the link between the test and socioeconomic status is no exception. An analysis of 1995 SAT scores of students from Evanston, Illinois, reveals that the gap between black and white students does disappear when looking solely at students whose parents' income is below \$10,000 or above \$70,000. Similarly, there is still a gap between students who have at least one parent with a graduate degree or between students whose parents do not have high school degrees. See Pam Belluck, *Results Sought for Lag by Black Students in School Effort*, THE NEW YORK TIMES, 1 (July 4, 1999, Late Ed., Sec. 1, col. 1). ("...some researchers say those results might be partly explained by other factors: subtle cultural biases in tests or in schools, the many fewer black parents than white parents with advanced educational backgrounds, or the possibility that black children may have been ore likely than whites to overstate or misconstrue their parents' educational history....But some students and parents say that teachers and guidance counselors, white or black, may, consciously or unconsciously, have lower expectations of African-American students and that this may translate into self-fulfilling prophecies of mediocrity.")

⁷⁹ See Pentimone, *The NCAA's Quest to Education the Student-Athlete*, *supra* note 4 at 498.

⁸⁰ See Timothy Davis, *African-American Student-Athletes: Marginalizing the NCAA Regulatory Structure?*, 6 MARQ. SPORTS L.J. 199, 210 (Spring 1996).

⁸¹ See *id.*

requirements as “embarrassingly low,” citing the admission of football players with scores nearly 600 points lower than the median score for incoming freshmen.⁸²

Additionally, advocates of Proposition 16 contend that the measure marks an attempt by the NCAA to encourage student-athletes to acknowledge the true purpose of the college experience—to attend class and earn a degree.⁸³ These supporters acknowledge that Proposition 16 denies non-qualifiers the chance to receive athletic financial aid or to compete as college freshmen, an outcome detrimental only to those student-athletes hoping to use college as a springboard to professional sports careers. To be sure, the number of football and basketball players who leave college early, or, in the case of basketball, skip it entirely, enforces the notion that many potential professional athletes have no desire to either earn a degree or graduate. Although unfortunate for underprivileged students relying athletics as their ticket to college or financial aid, eligibility requirements are nevertheless necessary to preserve the integrity of collegiate athletics. Minimum eligibility standards enforce the concept that student-athletes ought to consider graduating with a degree their top priority, despite the fact that they may have been recruited for their athletic ability.⁸⁴

The strongest claim against Proposition 16 is that its reliance on the SAT bars a disproportionate number of African-Americans from athletic eligibility. However, critics of the NCAA’s academic eligibility standard argue that the SAT is useless as a universal balancing standard and that the NCAA’s inclusion of SAT scores in its eligibility formula is a misapplication of the test.⁸⁵

The standard argument that the SAT is not a “common yardstick” is that most college admissions officers will more likely pursue a student with “uncommon” backgrounds or experiences. As one commentator claims, colleges typically prefer a student “who lives in an inner city with poor parents who never completed high school, attends the neighborhood public school, lacks a quiet place to study, works to help the family make ends meet, and scores 600 on the SAT verbal” to a suburban applicant with the same score who comes from a college-educated family and attends an elite college-preparatory high school.⁸⁶ While not inaccurate, this scenario does not support the notion that the SAT has no use as a universal balancing standard. Instead, this reasoning concentrates more on the desirability that admissions committees attach to less fortunate students who perform well on the test. Simply because a student is relatively underprivileged does not preclude the possibility that he or she will do well. Rather, the fact that the SAT tends to (though does not always) sort students by their access to test-taking aids merely suggests that the probability of an underprivileged student’s success is lower. Accordingly, a student with a relatively disadvantaged background who scores well is “rarer” than a more advantaged student with the same score, and therefore more sought after by schools competing against one another for the most attractive candidates. This notion gains support from the fact that most college admissions committees do not look at SAT scores in a vacuum, but admit incoming students in categories.⁸⁷ Therefore, in the eyes of an admissions

⁸² See Pentimone, *supra* note 4 at 482.

⁸³ See *id.* at 499.

⁸⁴ See *id.* at 504. (“When an athlete signs a standard NCAA Letter of Intent with a school, that athlete acknowledges Item 4 of the letter: ‘I understand that I have signed this letter with the institution and not for a particular sport.’”)

⁸⁵ See Shropshire, *Colorblind Propositions*, *supra* note 13 at 145; Bracey, *Put to the Test*, *supra* note 2 at 45.

⁸⁶ See Bracey, *supra* note 2 at 45.

⁸⁷ See *id.* (“Colleges admit by categories: the brains, the all-American kids, the special talents (athletes, artists, actors, musicians, etc.), the social conscience admits (perhaps an endangered species as more state laws take effect

committeeperson, the “uncommon” underprivileged student appears more attractive than the more “average” suburban student. To Proposition 16, both are equal, assuming they earned the same grades in high school.

Responding to critics who claim that Proposition 16 misapplies the SAT, it is sufficient to assert that the NCAA simply uses the test differently than admissions officers. Rather than evaluating prospective students individually, using the SAT merely as one factor to determine the applicant’s qualifications, the NCAA, as described above, uses the SAT in the abstract. Its strength lies in the fact that it is a universally applicable standard that establishes an easily discernible baseline. Every high school student who takes the SAT sits for the same test, under the same conditions, and receives a score easily balanced with those of other test takers.

C. Alternatives to Proposition 16

Since Proposition 16’s implementation in 1996, critics have developed numerous alternatives that the NCAA could use to determine academic eligibility. Among these include eliminating freshman eligibility, abandoning standardized testing and relying solely on high school GPA, adding a fifth year of athletic eligibility, adopting a race-conscious standard akin to Affirmative Action, improving high school education, and altogether abandoning minimum academic thresholds.⁸⁸ The notions of eliminating first-year eligibility, altering the length of eligibility, and improving the nation’s high schools receive ample treatment elsewhere, the strengths and weaknesses of each argument clearly delineated.⁸⁹ Suffering from equal exhaustion is the idea that the NCAA ought to rely solely on prospective student-athletes’ high school grades. This position is subject to the same criticisms that prompted the NCAA to abandon the 2.0 Rule in 1986. Additionally, the suggestion that the NCAA adopt a race-conscious method of evaluating SAT scores to counter the score discrepancy between African-American and white students has also been the subject of adequate discussion.⁹⁰ The unfairness of adopting a race-conscious standard and the impracticality of either allowing individual schools to determine their own eligibility or completely discarding academic requirements altogether deserve further treatment.

1. Abandon Minimum Academic Eligibility?

With little alternative to regulations like Propositions 48 and 16 that rely on national standardized testing, the debate turns to whether the NCAA’s compelling interest in increasing matriculation rates justifies the use of policies that disqualify a disproportionately high percentage of minority students.⁹¹ Although Proposition 16 succeeded in raising the graduation rate of black student athletes, with few viable substitutes its opponents seem obliged to embrace the notion that the NCAA ought to altogether abandon its attempt to establish minimum academic eligibility requirements.⁹²

forbidding colleges to take ethnicity into account), the legacies (offspring of alumni), and the paying guests (those who don’t need scholarship help).”).

⁸⁸ See Shropshire, 148-150, *supra* note 2.

⁸⁹ See *id.* See also Hunt, 297-299 *supra* note 16.

⁹⁰ See Shropshire, 141 *supra* note 2; Bruton, 602-603, *supra* note 23.

⁹¹ Pryor, 288 F.3d at 553, citing *Cureton v. NCAA*, 198 F.3d 107, 111.

⁹² See Elmore, *Leveling the Testing Playing Field*, *supra* note 66.

In addition, some opponents of Proposition 16 claim that the NCAA should abandon eligibility standards altogether because many student-athletes attend college merely to jumpstart careers in professional sports.⁹³ These critics candidly suggest that student-athletes have little use for college degrees and consider minimum academic standards akin to requiring potential physics or mathematics majors to meet minimum physical fitness requirements in order to qualify for financial aid.⁹⁴ However, this view dramatically misinterprets the roles that colleges and universities play in American society. First, while the nation's colleges might supply the NFL and NBA with a substantial number of athletes, undergraduate institutions supply nearly 100 percent of the nation's law and medical students. Second, and much more importantly, abolishing minimum academic eligibility standards (or undercutting their effectiveness) would simultaneously destroy the value of an undergraduate degree and transform the college experience from a privilege into an entitlement akin to public secondary schooling. To be sure, potential pre-law and pre-med high school graduates have as little need for an undergraduate degree, per se, as do future professional athletes. Nevertheless, abolishing minimum academic eligibility requirements would also leave little room in college sports for student-athletes who fail to "graduate" to the professional level, those who participate in sports without professional equivalents, or those who have no desire to continue playing professionally, to say nothing of the student-athletes who compete in Division II or Division III athletics.

Finally, abandoning Proposition 16 will likely render college athletics, football and basketball especially, more vulnerable to corporate and political manipulation. The degree to which many schools currently bend their own rules, not to mention NCAA regulations, to court promising student-athletes indicates the important role revenue plays in college sports.⁹⁵ Removing minimum academic standards would transform college football and basketball into entities almost devoid of ties to their host institutions. Schools would have little incentive to prevent them from recruiting student-athletes without regard to what they might offer to the campus academically. Additionally, administrative personnel would have little reason to worry how a student-athlete performs in the classroom or whether he or she even registers for or attends class.

2. Allow Individual Schools to Establish Their Own Eligibility Standards

Another option is for individual schools to apply their own minimum academic standards. However, while all colleges and universities do use their own admissions criteria to evaluate general applicants, it is unrealistic to expect schools, without an overarching governing body, to firmly enforce their own rules when the financial reward for admitting students with superior athletic skills, regardless of their poor classroom performance, is so great. To be sure, as one critic acknowledges, "given the hotly competitive nature of college sports, it would be foolish to return to a system where each school sets its own rules."⁹⁶ In contrast, the NCAA's opponents vehemently argue that its "regulations have nothing to do with either education or the well-being of the young people involved. The fundamental issue with initial-eligibility requirements is that

⁹³ See *Setting Minimum Academic Standards in College is Wrong*, (13 Feb. 2003), at <http://www.smallwords.org/000189.html> (October 30, 2003).

⁹⁴ *Id.*

⁹⁵ See Robert Lipsyte, *Economics Remain No. 1 in the Business of College Sports*, THE NEW YORK TIMES, 11 (Dec. 15, 2002, Sec. 8); Robert Lipsyte, *Expectations and Realities Differ In the World of the N.C.A.A.*, THE NEW YORK TIMES, 13 (Nov. 3, 2002, Sec. 8).

⁹⁶ See *Fairness for Black College Athletes*, THE NEW YORK TIMES, 30 (Mar. 11, 1999, Late Ed., Sec. A).

they inevitably become entrance requirements, and the NCAA simply has no business deciding whom a college can admit.”⁹⁷ But while critics may fairly condemn the NCAA’s underlying motives, it is difficult to balance the equation of eligibility requirements with general entrance requirements. Whether a student-athlete is eligible to participate or receive athletic financial aid as a freshman has nothing to do with a school’s decision to admit him or her on academic or any other grounds. Clearly, simple failure to meet Proposition 16’s eligibility requirements does not preclude a student-athlete from enrolling or attending class. Even assuming a prospective student-athlete requires financial aid to afford a college education, there is seemingly nothing preventing a school from channeling need-based aid to a student-athlete with substandard academic marks.

The determination of eligibility standards ought to rest with the NCAA. Nevertheless, many colleges and universities still depend largely on income generated from their men’s basketball and football programs to not only fund their athletic programs but other non-sports-related aspects of the school as well.⁹⁸ As a result, a decision to invalidate Proposition 16 will ultimately force the NCAA to reconcile its laudable desire of establishing minimum academic standards with its desire for the cash that flows from collegiate football and basketball programs.

D. College Sports and the Educational Experience

If the courts determine that the NCAA adopted Proposition 16 because of its discriminatory impact on minority student-athletes, the NCAA will have few, if any, means of establishing viable minimum academic eligibility requirements in the future. Although several alternatives exist, choosing among a variety of eligibility criteria is meaningless without a clear sense of the competing interests at stake. As David P. Bruton, counsel to the NCAA in Title VI litigation, including *Cureton* and *Pryor*, acknowledges, “the selection of eligibility standards for freshman athletic competition and scholarships is pre-eminently a value driven exercise.”⁹⁹ Bruton cogently explains these interests, between which the NCAA must ultimately strike a balance:

The “right” standard to be selected depends entirely upon the relative weight to be apportioned among competing interests: if the freshman opportunity to participate in athletics is of paramount importance, that opportunity should be afforded to as many student-athletes as possible. If the highest value is placed on successful academic performance by those who are selected for athletic scholarships, a more stringent academic standard for athletic ability will be seen as appropriate. If maximizing minority opportunities for athletic scholarship is most important, an eligibility standard that minimizes the impact of racial differences in academic performance and readiness will be preferred. There is no legally “right” or “wrong” weight that can be assigned to these competing interests.¹⁰⁰

Whether viewed as a valuable organization tackling a thankless endeavor, or a corporate regime attempting to gloss over exploitative motives, the NCAA, not the judicial or political

⁹⁷ See Dennis Williams, *Changing the Rules of the Game*, NEWSWEEK, 12 (April 5, 1999). Williams directs the Center for Minority Educational Affairs and teaches English at Georgetown University.

⁹⁸ See NCAA Fact Sheet, *supra* note 7.

⁹⁹ See Bruton, 602 *supra* note 23.

¹⁰⁰ See *id.*

systems, ought to have the final word on eligibility requirements.¹⁰¹ Currently, the NCAA acts as a legislative body consisting of representatives from the member institutions, an arrangement that, as critics are quick to acknowledge, neither affords student-athletes (or any other group, for that matter) a voice nor gives discretion to individual schools. In contrast, the NCAA counters that the determination of eligibility standards ought to hinge on the collective agreement of the member institutions that must compete under the standards chosen.¹⁰² Giving individual schools sole discretion to determine the eligibility of athletic recruits is infeasible. Equally problematic is the notion that prospective student-athletes ought to have a voice in the decision-making process. To be sure, school admissions personnel do not consult potential applicants to determine the type and scope of general admissions criteria. Additionally, while it is ideal to consult current student-athletes when dealing with matters outside the scope of eligibility—the exploitation of their on-field efforts without compensation, for example—little is lost in ignoring the voice of an incoming student-athlete whose primary concern about eligibility standards is likely whether they are low enough for him or her to meet. Nevertheless, the determination of fair and reasonable eligibility standards certainly requires a good faith effort on behalf of the NCAA to balance academic principle with its commitments to racial justice, educational opportunity, and organized sports. However, this decision lies within the traditional sphere of academic policy and properly rests with colleges and universities until they demonstrate an incapacity or unwillingness to strike a genuine balance between these clashing interests.¹⁰³

Drawn broadly, the dichotomy between academics and athletics at Division I schools seems to question the purpose of the college experience itself. Specifically, the NCAA faces the daunting task of reconciling the collision between America's (as well as the collegiate world's) growing devotion to organized sports and its commitments to racial justice and educational opportunity.¹⁰⁴ However, while the implementation of minimum academic standards undeniably reveals the NCAA's desire to maintain the academic integrity of college sports, many critics assert that this is merely a maneuver to avert attention from more sinister motives.¹⁰⁵ Much has been made of the commercialization of college sports and the NCAA member schools' willingness to profit at the expense of student-athletes.¹⁰⁶ For example, opponents of the NCAA claim that the courts have historically been too deferential to the NCAA, asserting that the organization has "betrayed its moral and legally defined role as a protector of youngsters" and "perverted the in loco parentis doctrine like the greedy parents of a financially valuable child

¹⁰¹ For a treatment of the NCAA's often conflicting endeavors, see Lipsyte, *Lesson No. 1*, *supra* note 7.

¹⁰² *See id.* at 569.

¹⁰³ *See id.* at 603.

¹⁰⁴ *See id.* at 569-570. ("Almost all colleges and universities now treat athletic ability as a talent to be recruited at least as diligently as intellectual or artistic talent, but the competition for athletes is fiercest at Division I schools. Where the competition is greatest, so is the perceived need for elaborate rules and enforcement mechanisms to regulate it. And like racial justice and educational opportunity, participation in organized sports has come to be seen by many as a fundamental right. At the same time, athletic success has become an almost universal goal. It is no longer enough to compete; you have to win. To regulate this relentless competition in higher education for athletes and victory and to rationalize it with other educational goals is the thankless task of the NCAA.")

¹⁰⁵ *See* Robert Lipsyte, *Finding a Place for Football In Arenas of Duty and Honor*, THE NEW YORK TIMES, 13 (Mar. 17, 2002, Sec. 8). ("Division I-A football is about entertainment, profit-taking, and preparing student-ATHLETES for the pros.") *See also* Robert Lipsyte, *In College Athletics, You Have to Follow the Money*, THE NEW YORK TIMES, 11 (Jan. 27, 2002, Sec. 8).

¹⁰⁶ *See* Robert Lipsyte, *The Issue Is the Paltry Support for Supporting Players*, THE NEW YORK TIMES, (Apr. 7, 2002, Sec. 8, p. 11) (quoting W. Burlette Carter). *See also* Robert Lipsyte, *Economics Remain No. 1*, *supra* note 91; Lipsyte, *Finding a Place for Football*, *supra* note 73; Lipsyte, *You Have to Follow the Money*, *supra* note 73.

actor.”¹⁰⁷ Although the alleged exploitation of student-athletes and profit-taking motives of the NCAA is a substantial topic in its own right, the debate over the proper substance of academic eligibility requirements strikes at the heart of the larger controversy surrounding the nature and purpose of collegiate athletics, as well as the proper role of the NCAA.

IV. CONCLUSION

In the wake of the Third Circuit’s decision in *Pryor*, the NCAA amended Proposition 16 to reduce its reliance on the SAT and minimize the number of student-athletes denied athletic ability due to low test scores. Nevertheless, opponents of the SAT will likely contend that the NCAA’s fundamental error is not the degree to which it relies on a system that breeds discrimination, but that the NCAA uses a discriminatory system at all. To be sure, an eligibility standard that makes grades and test scores determinative may overlook prospective student-athletes with the ability and determination to excel in the classroom as well as the athletic arena. However, a finding that invalidates Proposition 16 would make it virtually impossible for the NCAA to impose minimum academic standards of eligibility and render collegiate athletics more vulnerable to political and corporate wealth. Additionally, it is not within the NCAA’s role (nor within its power) to resolve racial differences in academic performance or address the socioeconomic circumstances that contribute to them. The NCAA properly administers minimum academic requirements as a safeguard to individual colleges and universities that exempt talented student-athletes from ordinary admissions criteria. Relying solely on a prospective student-athlete’s high school grades to determine eligibility fails to account for the lack of uniformity in the nation’s high school grading procedures as well as the prospect that high school faculty might unfairly boost the grades of an otherwise ineligible student-athlete. Equally problematic are standards that altogether ignore “hard” variables—high school grades, test scores—or that contain too many criteria and are cumbersome to apply without detailed, individualized scrutiny. Not only is it beyond the scope of the NCAA to rewrite the admissions criteria for the nation’s undergraduate institutions, but it is misguided to expect that the NCAA is better equipped than the judicial system, working through undergraduate admissions programs, to harmonize the racial disparity of academic achievement and opportunity. Instead, the NCAA ought to ensure that colleges and universities hold student-athletes to *some* academic standard that is universally applicable and does not require the protracted, holistic review required of undergraduate admissions programs.¹⁰⁸ Proposition 16, in spite of (and because of) its utilization of the SAT, adequately achieves this objective.

At the heart of the debate over minimum academic requirements rests the NCAA’s conflicting interests in maximizing profit and protecting the integrity of collegiate athletics. But whether viewed as magnanimous organization boldly attempting to “regulate the relentless competition in higher education for athletes and victory and to rationalize it with other educational goals,”¹⁰⁹ or as “a cartel exercising control over the huge profit-making enterprise of college athletics,”¹¹⁰ the final determination must rest with the NCAA rather than judicial dictate. Proposition 16 is fundamental to the NCAA’s ability to emphasize that academics are (and ought

¹⁰⁷ See Lipsyte, *The Issue Is the Paltry Support for Supporting Players*, *supra* note 63, quoting W. Burlette Carter of George Washington University Law School.

¹⁰⁸ See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹⁰⁹ See Bruton, *supra* note 23, at 570.

¹¹⁰ See Lesley Chenoweth Estevao, *Student-Athletes Must Find New Ways to Pierce the NCAA’s Legal Armor*, 12 SETON HALL J. SPORT L. 243, 248 (2002).

to remain) the primary focus of the undergraduate experience. While increasing numbers of student-athletes may view college merely as a training ground for professional athletics, it lies with the NCAA, as well as individual undergraduate institutions, to preserve collegiate athletics as truly extracurricular activities.